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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-923

OLINKRAFT, INC.,
Petitioner

versus

MARY EVELYN CLARK,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OLINKRAFT, INC.,
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versus

MARY EVELYN CLARK,
Respondent

STATEMENT OF THE CASE

The respondent, Mary Evelyn Clark, was employed by the petitioner, Olinkraft, Inc., on March 12, 1964, as a feeder-grabber in its paper mill operations. On October 1, 1974, a period in excess of ten years from the date of her employment with petitioner, the respondent was finally promoted from feeder-grabber to the position of roll handler.[1] A settlement of charges filed under Title VII of the Civil Rights Act of 1964, as amended, against petitioner by female employees alleging sex discrimination in petitioner's pay and promotion policies was entered into on December 12, 1974 (Appendix I, pages A-64-72).[2] The respondent

1. Petitioner contends the date of respondent's initial promotion from feeder-grabber to roll handler was September 8, 1974.

2. Petitioner contends the "AC" agreement was "effective" on August 12, 1974, although said agreement was not signed until December 12, 1974, apparently solely because the agreement contained a provision that it be considered effective as of August 12, 1974.

was not a party to this settlement and received no funds as did the other female employees to compensate her for petitioner's past discriminatory practices. On March 5, 1976, the respondent filed a written charge under oath with the Equal Employment Opportunity Commission in which she alleged that she suffered injury by the defendant because she had been denied job promotions and pay on the basis of her sex. In a written decision dated July 23, 1975, the Equal Employment Opportunity Commission did not find reasonable cause to believe that respondent had been discriminated against by the petitioner in violation of the Civil Rights Act of 1964. On October 7, 1975, the present action was brought in the United States District Court for the Western District of Louisiana.

The respondent specifically alleged in her complaint that for some time prior to the Spring of 1964 and for some period of time thereafter, the petitioner had an established policy or practice of promoting to better paying jobs over qualified females, males with less seniority, and of paying females a lesser salary than males performing the same job. The respondent also alleged in her complaint that during the period from March 12, 1964, to October 1, 1974, a period in excess of ten years, the petitioner continued to promote from feeder-grabber to roll handler numerous males with less seniority than the respondent, a qualified female. The respondent also specifically alleged in her complaint that during this period males with less seniority than respondent were paid a higher salary than respondent for performing the same job. Additionally, the respondent specifically alleges that the unlawful employment practices of the petitioner have not ceased by virtue of the fact that the petitioner continues to promote to better paying jobs males with less seniority than the respondent who is qualified for such better paying jobs. Further, the petitioner also continues to pay males with less seniority than the respondent a greater salary for performing the same job as respondent.

The petitioner moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted under 42 USCA § 2000-5(e) because "all allegation of the complaint are based on facts and events which occurred more than one hundred eighty days prior to March 5, 1975, which was the date of the filing of her charge of employment discrimination with the United States Equal Employment Opportunity Commission." See Motion to Dismiss. The motion to dismiss was granted by the trial court.

The respondent appealed the decision of the trial court to the United States Court of Appeal for the Fifth Circuit. On August 4, 1977, a three judge panel of the Fifth Circuit, Judge Coleman dissenting, reversed and remanded the judgment of the trial court. Contrary to the assertions of petitioner before the Fifth Circuit and in its Statement of Facts contained in its petition, and as found by the Fifth Circuit, there were material facts in dispute in the instant case, as set forth in respondent's opposition to the petition for a writ of certiorari, infra.

OPPOSITION

The decision of the three judge panel of the Fifth Circuit in reversing the trial court was correct and the petitioner's request for the granting of a writ of certiorari should be denied for the reasons set forth below:

A. The United States Court of Appeal for the Fifth Circuit correctly found that the respondent's complaint stated a cause of action upon which relief could be granted such that such complaint was not barred by Section 706(e) of Title VII of the Civil Rights Act of 1964.

B. The United States Court of Appeal for the Fifth Circuit correctly found that if the lower court dismissal order was viewed as a summary judgment, there existed a critical disputed factual question concerning acts of discrimination which precluded the entry of summary judgment.

C. The decision of the United States Court of Appeal for the Fifth Circuit does not conflict with the decision of this Honorable Court in *United Airlines, Inc. v. Evans*, 431 US 553, 52 L. Ed. 2d 571 (1977), the recent decisions of other panels in the Fifth Circuit in the cases of *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) and *Cutliff v. Greyhound Lines, Incorporated*, 558 F2d 803 (5th Cir. 1977), or the recent decisions of other panels in other circuits.

ARGUMENT

A.

The United States Court of Appeal for the Fifth Circuit correctly found that the respondent's complaint stated a cause of action upon which relief could be granted and was not barred by Section 706(e) of Title VII of the Civil Rights Act of 1964.

It is well settled that where the alleged unlawful employment practice is continuous in nature, the failure to file a complaint with the Equal Employment Opportunity Commission within 180 days after the unlawful employment practice occurred does not constitute a bar to the suit under 42 USCA §2000(e) et seq. *Gamble v. Birmingham Southern Railroad Company*, 514 F.2d 678 (5th Cir. 1975); *Palmer v. General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1975); *Rich v. Martin Marietta Corporation*, 522 F.2d 333 (10th Cir. 1975). In the instant case, as found by the Fifth Circuit, the respondent does not simply contend that the "AC" agreement between the United Paperworkers International Union, Local No. 654, and petitioner does not remedy the effects of past discrimination, but also that discrimination in promotion and pay constitutes a continuing and unlawful employment practice in violation of Title VII.

In the trial court, the petitioner contended that the failure to promote does not constitute a continuing violation and heavily relied on the failure to hire cases which held that the failure to hire did not constitute a continuing violation. See *Collins v. United Airlines, Inc.*, 514 F.2d 594 (9th Cir. 1975) and *East v. Romaine, Inc.*, 518 F.2d 332

(5th Cir. 1975). The argument that the principles applicable in a failure to hire case are applicable in a failure to promote case has been clearly rejected in *Rich, supra*. The Court in *Rich* commented on the failure to promote as follows:

> "We finally must take up the factor of timing. The Court found that in some instances there were no openings in positions for which the plaintiffs were qualified within the 90 days prior to the filing of charges with the EEOC. The court apparently read *McDonnell-Douglas* as saying that if an employer has employed no one during the 90 days preceding the filing of charges with the EEOC, it is impossible to have an unlawful employment practice committed within the time limitations of 42 U.S.C.§ 2000e-5(e).
>
> This is in relation to the *McDonnell-Douglas* criterion requiring that plaintiff show that he applied for a job for which the employer was seeking applicants. *Clearly this applies to new employment and is different from an employee who is seeking promotion. The former takes place on a particular day, whereas in the promotion area it invariably arises during a lengthy period of time. Plaintiffs here challenge the entire promotion system maintaining that it continually operated so as to hold them in lower echelons. Hence, the 90 day period prior to the filing of the EEOC charges looms inconsequential in this kind of case.* If proven, these charges of discriminatory refusal to promote would be violative of 42 U.S.C. §2000e-5." *Id.* at 348. (Emphasis added.)

As found by the Fifth Circuit, the respondent's allegations are sufficient to toll the running of the one hundred eighty day period in Section 706(e) of Title VII of the Civil Rights Act of 1964.

Assuming *arguendo* that the respondent's only claim related to the continuing effects of past discrimination, the respondent's action is still not time barred. The respondent specifically alleged in her complaint that during the period from March 12, 1964, to October 1, 1974, the date respondent was promoted to roll handler, the petitioner continued to promote from feeder-grabber to roll handler numerous men with less seniority than respondent and during this period men with less seniority than respondent were paid a higher salary for performing the same job. Thus, whether the date of respondent's promotion was October 1, 1974, or September 8, 1974, as contended by petitioner, there was clearly a failure to promote respondent within the 180 day statutory period prior to the respondent filing her charge with the Equal Employment Opportunity Commission.

B.

The United States Court of Appeal for the Fifth Circuit correctly found that if the lower court dismissal order was viewed as a summary judgment, there existed a critical factual question concerning acts of discrimination which precluded the entry of summary judgment.

In its oral argument before the Fifth Circuit, the petitioner contended that viewed as a summary judgment, the respondent's only possible claim was that the continuing effects of past discrimination make her filing timely and that

even if this theory might be valid in some circumstances, petitioner's agreement with the Union provides full relief and thus, the theory has no validity in the instant case. However, as aptly pointed out by Judge Wisdom in the majority opinion, the question of whether or not the Union agreement provides full relief must be determined initially by the district court. No such determination has yet been made. *Franks v. Bowman Transportation Company*, 424 U.S. 747, 47 L.Ed. 2d 444 (1976).

Additionally, there exists a critical disputed factual question concerning the active discrimination that continued beyond the alleged effective date of the agreement with the Union. The respondent repeatedly stated in her deposition that even after the alleged effective date of the agreement, men with less company seniority than her were promoted ahead of her. (Appendix J A-132-134, 142, 143) As a result, summary judgment was inappropriate.

The argument of the petitioner that the respondent had been properly promoted based on her company seniority to all jobs which she was qualified to perform is without merit. Respondent testified that several males with less company seniority than her were promoted to positions ahead of her (Appendix J A-132-134, 142, 143) Obviously, the "catch" as pointed out by respondent was that in order to qualify for a position, one had to be trained by petitioner. As evidenced by her deposition, the petitioner chose to train and thus "qualify" for a better paying job, males with less company seniority than respondent. The argument that respondent was treated fairly because she was promoted to all positions which she was "qualified" to perform is both hollow and specious. See *Gamble v. Birmingham Southern Railroad, supra.*

C.

The decision of the United States Court of Appeal for the Fifth Circuit does not conflict with the decision of this Honorable Court in *United Airlines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed. 2d 571 (1977), the recent decisions of other panels in the Fifth Circuit in the cases of *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) and *Cutliff v. Greyhound Lines, Incorporated*, 558 F.2d 803 (5th Cir. 1977), or the recent decisions of other panels in other circuits.

In *United Airlines, Inc. v. Evans, supra*, the plaintiff was a stewardess who had been terminated in 1968 when she was married pursuant to United's discriminatory policy of refusing to allow its female flight attendants to be married. On February 16, 1972, she was hired as a new employee, and for seniority purposes, she was treated as though she had no prior service with United. The plaintiff filed sex discrimination charges against United in February of 1973.

This Honorable Court found that United's discriminatory termination of plaintiff in 1968 was a specific act taking place on a particular day. Thus, plaintiff had ninety days from her termination by United to file a charge of sex discrimination with the Equal Employment Opportunity Commission under the period then allowed by Section 706(d). Plaintiff's failure to file such a charge within the applicable time period allowed United to treat the past act of termination as lawful and she could not toll the applicable period by alleging solely that the effects of the prior act are not remedied in the existing seniority system. The Court clearly pointed out that in this case, the plaintiff did not allege in her complaint that the existing seniority system treated

female employees differently from male employees.

In the instant case, the respondent was not terminated, but rather simply not promoted and kept at a lowly pay scale due to the sexually discriminatory policies of petitioner. While the failure to hire or the termination of an individual takes place on a particular day, the failure to promote invariably arises during a lengthy period of time. Each day the respondent was not promoted in the instant case constituted a separate act of discrimination. Although there is a dispute as to the date of respondent's initial promotion from feeder-grabber to roll handler, whether the date of promotion be September 8, 1974, or October 1, 1974, there was a failure to promote within the applicable period for filing a charge of discrimination since the charge was filed with the Equal Employment Opportunity Commission on March 5, 1975.

Additionally, as aptly pointed out by the Fifth Circuit, the respondent, unlike Evans, contended not only did the "AC" agreement between the Union and Olinkraft not remedy the effects of prior discrimination, but also that discrimination in promotion and pay continued and constituted an unlawful employment practice in violation of Title VII. The instant case is clearly distinguishable from *United Airlines, Inc. v. Evans, supra.* The Fifth Circuit correctly found that respondent's claim was not time barred.

The recent decisions of the Fifth Circuit in *McMonigle v. Delta Airlines, Inc., supra,* and *Cutliff v. Greyhound Lines, Incorporated, supra,* are distinguishable from the instant case. In *McMonigle,* the plaintiff was terminated by Delta in 1967 when she became pregnant pursuant to company

regulations. No effort was made by plaintiff to seek reinstatement until 1973, six years later. When Delta refused to rehire plaintiff, she filed a charge with the Equal Employment Opportunity Commission on December 14, 1973. The Court correctly found that the charge was not timely filed since it was not brought within the applicable 90 day period from the date of her termination in 1967. The Court further pointed out that although other former married stewardesses were reinstated the law does not say that one female must be uniformly given the same treatment accorded some other female or group of females.

In *Cutliff, supra,* the Fifth Circuit addressed the question of continuing discrimination in a footnote. The case was decided on jurisdictional grounds, the Court finding that the plaintiff did not prove that he had filed any charges against the employer with the Equal Employment Opportunity Commission. The two sentence comment in footnote 5 of the opinion concerning continuing discrimination was mere dicta.

The instant case does not involve a failure to hire or a discriminatory termination or a failure to apply for employment due to discriminatory policies that took place years ago,[3] but rather a discriminatory failure to promote over a period in excess of ten years. Additionally, the respondent, unlike the plaintiffs in the cases cited by the petitioner, contended not only did the "AC" agreement between the Union and Olinkraft not remedy the effects of prior discrimination, but also that discrimination in promotion and pay continued and constituted an unlawful employment

3. See *DeGraffenreid v. General Motors,* 558 F.2d 480 (8th Cir. 1977) and *Cates v. Transworld Airlines,* 561 F.2d 1064 (2d Cir. 1977).

practice in violation of Title VII, a point on which exists a critical factual dispute. The decision of the Fifth Circuit in the instant case is correct and does not conflict with the other decisions cited by petitioner.

CONCLUSION

The decision of the United States Court of Appeal for the Fifth Circuit in reversing the trial court was correct and the writ of certiorari should properly be denied.

Respectfully submitted,

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BY: _____
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RESPONDENT, MARY
EVELYN CLARK

CERTIFICATE

I hereby certify that three copies of the above and foregoing Opposition to Petition for Writ of Certiorari has been this day forwarded to petitioner's counsel of record, Peyton Lacy, Jr., by mailing same to him, postage prepaid, to P.O. Box 488, West Monroe, Louisiana 71291, and to G. Phillip Shuler, by mailing same to him, postage prepaid, at 1500 First N.B.C. Building, New Orleans, Louisiana 70112.

Monroe, Louisiana, this 19th day of January, 1978.

_____
OF COUNSEL.